No. 80623-3

SUPREME COURT
OF
THE STATE OF WASHINGTON

MICHAEL MILLER; VICKI RINGER; and JOANNE FAYE TORGERSON, as trustee for the TORGERSON FAMILY TRUST;

Appellants,

v.

ONE LINCOLN TOWER LLC ,a Delaware Limited Liability Company; BELLEVUE MASTER LLC, a Delaware Limited Liability Company; LS HOLDINGS, LLC, a Washington Limited Liability Company

Respondents.

SUPPLEMENTAL BRIEF OF ~~APPELLANT~~ Petitioner

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The Provision Limiting Remedies in this Case [Provision Limiting Remedies] is substantially unconscionable. For the past 21/2 years, this Court has consistently held provisions limiting only one party's rights to a significant legal recourse are unenforceable because they are substantively unconscionable. The Provision Limiting Remedies limited Petitioners' [Buyers'] remedy to having their deposit returned without interest. Buyers were precluded from asserting any claim for compensatory damages against Respondents [Developers]. Developers, on the other hand, were allowed to collect liquidated compensatory damages from Buyers if Buyers breached the contract. As such, the Provision Limiting Remedies is substantively unconscionable, against public policy and failed its essential purpose. It cannot, therefore, be enforced by the Developers.

The Provision Limiting Remedies is also procedurally unconsionable. About 40-years ago, this Court enacted a special rule that applies when a party seeks to enforce an exculpatory clause that either disclaims warranties or excludes remedies in a consumer transaction. When these exculpatory clauses are present in a consumer transaction, it is the clause's proponent who must prove the provision was specifically negotiated and the excluded remedies were specifically enumerated. Here, it is undisputed Buyers contracted to purchase Developers' condominium units primarily for family or household purposes and the Provision Limiting Remedies was not specifically negotiated and did not enumerated the excluded remedies. As such, it was procedurally unconscionably and against

public policy.

Finally, the attorney fee provision has been construed in a one-sided manner that requires the Developer to be awarded its fees in any action for damages under the contract. According to the Court of Appeals, the Buyers won all they could win under the contract (a return of their deposit), but had to pay the Developers' attorney fees. Under this construction, the Buyers can never be awarded attorney fees and the Developers will be awarded attorney fees under all circumstances.

1. Substantive Unconscionability is a Defense to all Contracts.

Substantive unconscionability is a defense to any contract provision. Washington recognizes two types of unconscionability, substantive and procedural.[1] Procedural unconscionability, alone, especially when it involves provisions limiting remedies, can make a contract clause unenforceable.[2] Substantive unconscionability is where a contract clause is too one-sided.[3] Buyers challenged the Provision Limiting Remedies in this case as being substantively unconsionable.[4]

Despite having properly challenged the Provision Limiting Remedies as being substantively unconscionable, Division One side-stepped the substantive unconscionability analysis stating that unconscionability had been previously codified in the Uniform Commercial Code [UCC].[5] Because the UCC has an

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[1] *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 302-303, 103 P.3d 753 (2004).
[2] *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 344-45, 103 P.3d 773 (2004).
[3] *Zuver* at 303.
[4] MCP 203-210; FCP 208-215; Appellants' Opening Brief at 22-29; Appellants' Reply Brief at 13-21.
[5] Opinion at page 6 *citing Miller v. One Lincoln Tower LLC*, 139 Wn. App. 1018, 2007 WL 1733170 (Wn. App. Div. 1), page 3 *citing Yakima County (W.Valley) Fire Protection Dist. No. 12 v. City of Yakima,* 122 Wn.2d 371, 391, 858 P.2d 245 (1993) (*citing Jeffery v.*

unconscionability provision and the UCC does not technically apply to real estate provisions, the Court ruled real estate contracts are not subject to an unconscionability defense. Division One erred.

Other courts that have squarely considered the same issue have rejected the contention that the UCC's including unconscionability provisions in its sales provisions (Article 2) somehow makes common law unconsionability inapplicable to real estate contracts.[6] Moreover, Washington courts and other courts have routinely considered unconscionability defenses in real estate transactions.[7] Finally, this Court has routinely and consistently undertaken unconscionability analysis in non-sales contracts.[8]

The Provision Limiting Remedies in this case is substantively unconscionable and unenforceable because it exculpates the Developers from liability and effectively prevents the Buyers from pursuing valid claims for breach of contract compensatory damages. In *Zuver*, this Court held a remedies limitation provision

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Weintraub, 32 Wn. App. 536, 542, 648 P.2d 914 (1982)); *also citing Southcenter View Condominium Owners' Ass'n v. Condominium Builders, Inc.* 47 Wn. App. 767, 771, 736 P.2d 1075 (1986), *review denied,* 107 Wn.2d 1028 (1987) (citing RCW 62A.2-102).

[6] *See Casey v. Lupkes*, 286 N.W.2d 204, 207 (Iowa 1979).

[7] *Olmsted v. Mulder*, 72 Wn. App. 169, 177, 863 P.2d 1355 (1994). ("Although the Uniform Commercial Code is not directly applicable to the sale of real estate, UCC Article 2 provides us with some guidance on disclaimers of warranties."); *Casey*, 286 N.W.2d at 207 (Iowa); *Vockner v. Erickson*, 712 P.2d 379, 381-83 (Alaska 1986); *Sitgoum Holdings, Inc. v. Ropes*, 352 N.J.Super. 555, 800 A.2d 915 (2002); *Carey v. Lincoln Loan Co.*, 203 Or. App. 399, 420-29,125 P.3d 814 (2005); *City and County of Honolulu v. Midkiff*, 62 Haw. 411, 416-18, 616 P.2d 213 (1980)

[8] *Scott v. Cingular Wireless*, 160 Wn.2d 843, 857, 161 P.3d 1000 (2007) (holding a class action waiver in a cellular phone service contract is substantively unconscionable); *Zuver*, 153 Wn.2d at 302-22 (employment contract), *Alder*, 153 Wn.2d at 344-51 (employment contract); *Puget Sound Financial, LLC c. Unisearch*, 146 Wn.2d 428, 438-44, 47 P.3d 940 (2002) (service agreement); *Yakima County (W. Valley) Fire Protection Dist. No. 12 v. City of Yakima,* 122 Wn.2d 371, 391, 858 P.2d 245 (1993) (annexation agreement); *American Nursery Products, Inc. v. Indian Wells Orchards,* 115 Wn.2d 217, 220 (service agreement) and 222-34 (unconscionability analysis), 797 P.2d 477 (1990); and *Mieske v. Barelle Drug Co.*, 92 Wn.2d 40, 46-51, 593 P.3d 1308 (1979)(film processing services contract).

that effectively waived only one party's right to claim punitive damages was so one-sided that it was substantively unconscionable because it allowed only one party "access to a significant legal recourse."[9] This holding was recently reaffirmed and made generally applicable to all provisions limiting remedies that effectively waive only one party's right to a significant legal recourse. In *Scott v. Cingular Wireless* wherein this Court held,

> A clause that unilaterally and severely limits the remedies of only one side is substantively unconscionable under Washington law for denying any meaningful remedy.[10]

Following this reasoning, the Provision Limiting Remedies is substantively unconscionable because it effectively eliminated only Buyers' rights to compensatory damages against Developers, but did not similarly eliminate Developers' rights to compensatory damages against Buyers. In fact, it allowed Developers the right to collect liquidated compensatory damages against Buyers because Developers' could recover Buyers' deposit. Remember, the deposit in this case was Buyers' money. If Buyers' breached, then Developers got Buyers' money [their deposit]. If Developers breached, then Buyers got their own money back, but not a dime from Developers. Other courts considering substantively identical provisions in real estate contracts have found them unconscionable and struck them down.[11]

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[9] *Zuver*, 153 at 318.
[10] *Scott* 160 Wn.2d at 857.
[11] *Ocean Dunes of Hutchinson Island Dev. Corp. v. Colangelo*, 463 So.2d 437, 439-40 (Fla. 4th DCA 1985); *Blue Lakes Apartments, Ltd. v. George Gowing, Inc.*, 464 So. 2d 705, 709-10 (Fla 4th DCA 1985); *Seaside Community Development Corp. v. Edwards*, 573 So.2d 142, 147 (Fla. 1st DCA 1991); *Hackett v. JRL Development, Inc.*, 556 So.2d 601, 602-03 (Fla 2nd DCA 1990); *Port Largo Club, Inc. v. Warren*, 476 So.2d 1330, 1333 (Fla 3rd DCA 1985); *Clone Inc. v. Orr*, 476 So.2d 1300, 1302-03 (Fla 5th DCA 1985); and *Busman v. Beeren & Barry Investments, LLC*, 69 Va. Cir. 375 (2005).

A final point worth clarifying is the Buyers' deposits were not merely $5,000 as Developers contend in their Answer to Petition for Discretionary Review. Rather, "Buyers Miller and Ringer paid $5,000 up front and assigned $11,611 of their real estate commission, to be paid seven days before closing, equaling a five percent deposit on their condominium's $332,220 purchase price. Buyer Torgerson paid $5,000 up front and assigned $126,000 of her real estate commission, to be paid at closing, equaling a 10 percent deposit on her condominium's $1,310,000 purchase price."[12] Thus, Buyer Torgerson had $131,000 at risk and Buyers Miller and Ringer had $16,611 at risk if they breached the contract.

2. Because this was a consumer transaction, the *Berg-Baker* Special Rule applies and the Provision Limiting Remedies is unenforceable.

Washington affords buyers in consumer transactions when sellers try to enforce an exclusionary clause that disclaims warranties or limits remedies. In these limited circumstances, like the ones present in this case, the seller must prove: (1) the limitation of remedies cause was mutually negotiated; and (2) the Provision sets forth with particularity the remedies being excluded [The *Berg-Baker* Special Rule].[13] Sellers trying to enforce provisions limiting buyers remedies in a consumer transaction who cannot prove the *Berg-Baker* Special

[12] Opinion at 1.
[13] *Berg v. Stromme*, 79 Wn.2d 184, 194-95, 484 P.2d 380 (1971) (applying the Berg Special Protections to a warranty disclaimer) and *Baker v. Seattle,* 79 Wn.2d 198, 484 P.2d 405 (1971) (extending the Berg-Baker Special Rule to a provision limiting remedies).

Rule are not allowed to enforce the provision limiting remedies.[14]

The *Berg-Baker* Special Rule has been applied to real estate contracts. In *Olmsted v. Mulder*[15], the Court found an "as is" clause in a real estate was an exclusionary clause and applied the *Berg-Baker* Special Rule. Specifically, it found that exclusionary clauses are not favored by the law and applied the *Berg-Baker* Special Rule protections and required the seller to prove: (1) the clause was specifically negotiated and bargained for; and (2) the clause set forth with particularity the qualities and characteristics being disclaimed.[16] *Olmsted* cited *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*[17] to support its analysis. *Hartwig*, in turn, relied upon *Berg v. Stromme*.[18] *Olmsted*, therefore, applied the *Berg-Baker* special rule to a real estate contract containing exculpatory clauses.

Olmsted even looked to the UCC for guidance. The UCC typically does not apply to real estate cases; *Olmsted* held the UCC offered valuable guidance regarding disclaimers.[19] It then looked to Comment 1 of RCW 62A.2-316 that indicated warranty disclaimers are unenforceable unless the warranties are excluded by specific language.[20]

The *Berg-Baker* Special Rule applies with equal force to all exculpatory clauses, including provisions limiting remedies. There is a technical difference

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[14] *Id.*
[15] 72 Wn. App. 169, 863 P.2d 1355 (1993).
[16] *Id.* at 176.
[17] *Id. citing* 28 Wn. App. 539, 541-42, 625 P.2d 171 (1981).
[18] *Hartwig* at 542 *citing Berg v. Stromme*, 79 Wn.2d 184, 484 P.2d 380 (1971)
[19] *Id.* at 177-78.
[20] *Id.*

between a disclaimer clause and a provision limiting remedies.[21] Both, however, are considered exclusionary clauses.[22] Both must also meet the two-part *Berg-Baker* Special Rule.[23] To be sure, *Baker v. City of Seattle* involved a provision limiting remedies.[24]

Extending the UCC's protections regarding real estate contracts to exclusionary clauses is consistent with the reasoning in *Berg v. Stromme*.[25] In affording special protections to a consumer transaction involving and exclusionary clause, the *Berg* court relied on the reasoning in *House v. Thornton*.[26] Ironically, *House* involved a real estate contract. There, a manufacturer sold a home to a purchaser. Shortly after the purchaser took possession, he discovered the foundation and substructure were too defective and did not adequately support the structure.[27] In response to a suit brought by the home purchaser, the *House* court adopted the implied warranty of habitability to protect home buyers.[28] *Berg* described the *House* decision this way:

> In holding that the house was presumed by both seller and buyer to be reasonably fit for occupancy as a dwelling house by the buyer and his family, this court, we think, did no more than apply a rule of common sense to the kind of transaction that recurs perhaps more than a million

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[21] *See BC Tire Corporation v. GTE Directories Corporation,* 46 Wn. App. 351, 354, f.n.1, 730 P.2d 726 (1987).
[22] *Rottinghaus v. Howell*, 35 Wn. App. 99, 104, f.n.3, 666 P.2d 899 (1983).
[23] *Rottinghaus* at 104 *See, also, Puget Sound*, 146 Wn.2d at 438, f.n.12; and *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 259, 544 P.2d 20 (1975)
[24]75 Wn.2d 196, 199, 484 P.2d 495 (1971).
[25] 79 Wn.2d 184, 484 P.2d 380 (1971).
[26] 76 Wn.2d 428, 457 P.2d 199 (1969).
[27] *Id.* at 195-96.
[28] *Id.* at 436.

times annually in the country-the purchase of a brand new house.[29]

The Special protection in *Berg* were, therefore, inspired by Special Protections afforded a consumer in real estate contract. There is no sound policy reason, therefore, why the *Berg-Baker* Special Rule should not be applied to consumer transaction involving real estate.

a. The *Berg-Baker* Special Rule applies because the transactions, here, were consumer transactions.

The *Berg-Baker* Special Rule applies because the transactions here were consumer transactions. First, The UCC defines consumer transactions as goods purchased "primarily for personal, family or household purposes."[30] Second, Black's Law Dictionary defines a consumer transaction as a transaction primarily for personal, family or household purposes.[31] Third, the word consumer modifies the word transaction in the phrase "consumer transaction" and, therefore, the focus is on the underlying transaction and not the person engaging in the transaction.[32] Placing the focus on the underlying transaction and not the status or classification of the person consummating the transaction is consistent with Washington state, other state, and federal statutes dealing with consumer protections schemes.[33] Finally, no case applying the *Berg-Baker* Special Rule has examined a buyer's

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[29] *Berg* at 196.
[30] RCW 62A.2-103(3).
[31] Black's Law Dictionary, 8th Edition, Definition of "consumer transaction."
[32] See expanded argument in Appellants' Reply Brief at 4-5.
[33] Reply Brief at 4-5, footnotes 10-12 (Comprehensive lists of consumer protections statutes that apply a transaction-oriented approach); *see also Louisiana Nat'l Leasing Corp. v. ADF Service, Inc.*, 377 So.2d 92, 96 (La. 1979).

sophistication as part of the analysis. The focus is solely on the type of transaction.[34] Here, it undisputed that Buyers bought the yet-to-be-built condominiums at Lincoln Square primarily for family/household purposes. Ms. Torgerson reserved a condominium as her personal residence and Miller/Ringer reserved a condominium for their mother.[35] Moreover, Both Ms. Torgerson and Miller/Ringer signed agreements stating their purposes for purchasing these condominiums were personal in nature.[36]

It is undisputed the Provision Limiting Remedies violates the *Berg-Baker* Special Rule. First, the parties never negotiated the clause limiting remedies.[37] The Developer also did not set forth the remedies that were being excluded with particularity. Specifically, the Developer buried the Provision Limiting Remedies in the middle a 107-word sentence in its standard form contract, and the provision does not state that specific performance or incidental, consequential, compensatory or were not available to the Buyers.[38]

Developers argued this Court should apply the rule that applies to a commercial transaction. They want this Court to side-stepped the *Berg-Baker* Special Rule and apply the *Schroeder* totality of the circumstances rule, but that

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[34] Reply Brief at 7. (Neither the *Berg* nor the *Baker* courts determined the parties' sophistication prior to ruling).
[35] FCP 546; MCP 220.
[36] FCP 516-17; MCP 585-86.
[37] FCP 244, pg. 10, ln. 9 – pg. 11, ln. 14.
[38] CP 1423, ¶ 21.

rule is only used in purely commercial transactions.[39] Developer provided absolutely no authority treating buyers with personal motives as engaging in a commercial transaction. Moreover, Developer failed to cite to authority where a court analyzed the competency or business acumen of a Buyer in a consumer transaction. Finally, Developer's argument that the UCC unconscionability provisions only applies to cases involving the sale of goods is inconsistent with *Olmsted*.[40]

Finally, a totality of the circumstances approach will only invite litigation and provide the more sophisticated developer with additional defenses and more opportunity to exploit the inherent inequality in wealth and resources between home buyer and developer.

Developers' arguments, if accepted, would result in real estate professionals being afforded the Berg-Baker Special Rule of Protections in all personal transactions except real estate transaction. It would also mean judges and lawyers might not enjoy the special protections in any of their personal protections.

Buyers' arguments, on the other hand, once accepted by this Court will lend certainty and predictability to residential real estate transactions and provide buyers an efficient and certain remedy if they do not knowingly waive the special protection inherent in consumer transactions. Buyers' alleged sophistication is, and should be irrelevant. After all, if Buyers merely accepted their fate according

[39] *Puget Sound Financial* at 438-39 and *American Nursery* at 222-23.
[40] *See supra* at 5-9.

to the PSA as countless other buyers have previously done, then this Court would not have the opportunity to provide the necessary redress for all residential home buyers in the State.

Clearly, if this Court applies the *Berg-Baker* Special Rule to this case, then the Provision Limiting Remedies will be found unenforceable.

b. Even if this was a commercial transaction not involving unfair surprise, there is still procedural unconscionability.

Even if this Court applies the *Schroeder* "totality of the circumstances" approach for purely commercial transactions, there is still procedural unconscionability or, at the very least, a fact question that needs to be addressed at trial. First, the Developers' contract was clearly a contract of adhesion with Developer creating the contract and presenting it to Buyers on a "take it or leave it" basis.[41] Moreover, the Provision Limiting Remedies was clearly not conspicuous.[42] In fact, furthermore, there were no negotiations regarding this provision.[43] Developers admitted it did not negotiate the Limitation of Remedies Provision with Buyers.[44] Finally, Developers were substantially more sophisticated than Buyers. Buyers were real estate professionals, but Developers had developed retail, office, hotel, and luxury condominium mixed use complex in

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[41] *See Alder v. Fred Lind Manor*, 153 Wn.2d 331, 347-48, 103 P.3d 773 (2004) citing *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima,* 122 Wn.2d 371, 393, 858 P.2d 245 (1993) (citation omitted).
[42] *See supra* at fn. 39; *see also Nelson v. McGoldrick,* 127 Wn.2d 124, 131, 896 P.2d 1258 (1995).
[43] *American Nursery* at 240 *citing Schroeder* at 260.
[44] FPC 244 (Leider Dep 10:5-11:14).

downtown Bellevue and had a team of lawyers looking out for their interests.[45]

3. The Provision Limiting Remedies is unenforceable because it failed its essential purpose.

The Provision Limiting Remedies is unenforceable because it failed its essential purpose – to provide buyers a meaningful remedy. RCW 62A.2-719(2) which codifies protections against provisions limiting remedies, states a provision limiting remedies is unenforceable when it: (1) "deprive" a buyer of the essential value of its purchase[46]; and (2) lacks a minimum adequate remedy.[47] Washington Courts[48], and courts from other jurisdictions[49], have applied UCC provisions by analogy in non-UCC cases, and Washington Court have already applied the UCC by analogy to a real estate contract.[50] Moreover, the policy underlying RCW 62A.2.719 is almost identical to the common law substantive unconscionability analysis in *Scott*.[51] The UCC comment makes clear "it is of the very essence of a sales contract that at least minimum adequate remedies be available" and that sales contracts must provide "a fair quantum of remedy for breach of the obligations or

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[45] MCP 75-76; FCP 120-21; FCP 244 (Leider Dep 10:21-25).
[46] *Cox* at 370.
[47] *Marr Enterprises, Inc. v. Lewis Refrigeration Company*, 556 F.2d 951, 955, fn. 13 (9th Cir. 1977) (interpreting Washington law).
[48] Opening Brief of Appellant at 10-13 *citing Zuver v. Airtouch Communications* at 303; *Yakima County Fire Protection District No. 12* at 391; *Baker v. City of Seattle, supra*; *Mieske v. Bartell Drug Company*, 92 Wn.2d 40, 593 P.2d 1308 (1979); 25 Wn. Practice, Contract Law and Practice, § 9.3 (citations omitted).
[49] *Seabrook v.Commuter Housing, Inc.*, 72 Misc.2d 6, 338 N.Y.S.2d 67 (1972); *Honolulu v. Midkiff*, 62 Haw. 411, 418, 616 P.2d 213 (1980).
[50] *Olmstead, supra*; and Opening Brief of Appellant at 26-29 (discussing and citing Florida cases that apply UCC by analogy to real estate cases).
[51] *Supra*.

duties outlined in the contract."[52] Similarly, this Court, in *Scott* held provisions limiting remedies are substantively unconscionable if they deny a party "any meaningful remedy."[53] Buyers are asking this Court to do what the Court of Appeals failed to do: apply the UCC by analogy to a dispute over a Provision Limiting Remedies in a real estate contract to prevent an injustice and provide buyer a meaningful remedy if the developer breaches contract.

The Provision Limiting Remedies is unenforceable when viewed through RCW 62A.2-719(2)'s prism because it failed to provide Buyers with a minimum adequate remedy and robbed Buyers of the essential value of their purchase. Buyers waited 4 long years while the substantial value of their investment increased by hundreds of thousands of dollars.[54] Seller held Buyers' money for 4-years, used it to help finance its project, and then breached the contract after the value of the residential units had increased substantially. Developers then intentionally breached and sold the condominiums to new purchasers at substantially higher prices than the price quoted Buyers.[55] Developers did not breach PSAs they could not perform on because they could not build the units; rather, they intentionally breached the PSAs they were simply unwilling to deliver the condominiums units to Buyers.

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[52] RCW 62A-2-719, Comment1.
[53] *Scott*, 160 Wn.2d at 857.
[54] FCP 255 (Smith Dep. 67:19 – 68:14) (Smith testified that the value of Torgerson's unit climbed more than $500,000 and Miller/Ringer increased over $200,000).
[55] *Id.*

For the above reasons, this Court should apply RCW 62A.2-719(2) by analogy and find the Limitation of Remedies Provision unenforceable for failing its essential purpose.

4. The Limitation of Remedies Provision violates public policy and is unenforceable.

Buyers argued in their Opening Brief that the Provision Limiting Remedies has a tendency to do evil and is injurious to the public.[56] Buyers showed how Developers can hold Buyers' deposit money for years, use it to attract further investments and loans, and then breach with impunity in a healthy real estate market and sell to a new buyer at a higher price.[57] Buyers, on the other hand, would lose, any increase in the value of the residential condominium.[58] Developers' liability would be limited to simply giving of Buyers' deposited money back.[59]

Buyers' clarified the injurious nature of the Provision Limiting Remedies by how Developers had violated a federal law by placing such a limitation of remedies provision in its PSA.[60] The federal government, through the Interstate Land and Sales Act [ILSA], regulates large real estate development and had prohibited the application of Limitation of Remedies Provisions, like the development at issue here, in PSAs for condominium developments over 100-

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[56] Opening Brief of Appellant at 31 *citing Marshall v. Higginson*, 62 Wn. App. 212, 216, 813 P.3d 1275 (1991).
[57] *Id.* at 32.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 32-34.

units.[61]

Developers fell squarely within this prohibition, because they planned to build 148-units.[62] On appeal, Buyers argued that Developers' violation of ILSA was potent evidence that these clauses had violated public policy.[63]

Division One elected not to consider this argument, stating Buyers had not made this argument below.[64] ILSA was raised at the trial court. In their separately filed Opposition to Summary Judgment, both Ms. Torgerson and Miller/Ringer argued that because the Provision Limiting Remedies violates federal, specifically, ILSA, there was no valid commercial purpose for the provision that could render it conscionable.[65] This is essentially the same argument in different clothing. Therefore, contrary to the Court of Appeal's belief, Appellants did argue below that the Provision Limiting Remedies violated ILSA, so it was not valid.

Moreover, even if Appellants did not make this argument below, this Court can review all arguments necessary to "serve the ends of justice" including those issues not raised at the trial or appellate court level.[66] Buyers ask this Court to

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[61] *Id.* at 33.
[62] *Id.*
[63] *Id.* at 33-34.
[64] *Miller v. One Lincoln Tower*, 139 Wn. App. 1018, 2007 WL 1733170 (Ct. App. Div. 1) at 3.
[65] MCP 214; FCP 219.
[66] *Biggers v. City of Bainbridge Island,* 162 Wn.2d 683, 692, 169 P.3d 14 (2007) *citing Tuerk v. Dep't of Licensing,* 123 Wn.2d 120, 124, 864 P.2d 1382 (1994) (*quoting Kruse v. Hemp,* 121 Wn.2d 715, 721, 853 P.2d 1373 (1993)); *see also Harris v. Dep't of Labor & Indus.,* 120 Wn.2d 461, 468, 843 P.2d 1056 (1993).

consider this pivotal argument in the interests of justice.

Developers' failure to comply with ILSA is at the heart of the injustice perpetrated by Developers against Buyers. The impact of this failure to comply is crucial evidence necessary to reach a fair conclusion in this case. Developers had realized part way through the pre-sale process that it was in violation of ILSA requirements.[67] In response, Developers removed the Provision Limiting Remedies from new pre-sale contracts and replaced the Provision with new language that no longer restricted remedies.[68]

Developers were required to change all contracts to remove the offending language.[69] Developers did not make the required changes to Buyers' contracts.[70] As a result, these contracts remained in violation of ILSA regulations.[71] Ironically, Developers failure to adhere to ILSA requirements now enables it to argue before this Court that Buyers' remedies are limited under the contract terms even though these terms unequivocally violated ILSA.

Buyers' Opening Brief clearly delineates how the facts in this case, including Developers' violation of ILSA, unambiguously violate Washington public policy under the *Marshall v. Higginson*[72] public policy test.[73] Buyers further demonstrated, in its Petition for Review submitted to this Court, how this Court's

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[67] *Id.* at 6 and 24; Petition for Review at 6.
[68] *Id.* at 6 and 24; Petition for Review at 6.
[69] *Id.* at 24.
[70] *Id.* at 24.
[71] *Id.* at 24.
[72] 62 Wn. App. 212, 216, 813 P.3d 1275 (1991).
[73] Opening Brief of Appellant at 31-34.

Wagonblast[74] factor test (applied to contractual exculpatory clauses) is applicable to these facts and how these factors demonstrate that the Provision Limiting Remedies is against public policy.[75]

Finally, Buyers' Petition for Review explains how the Court of Appeal's ruling is contrary to this Court's recent pronouncements regarding public policy in *Scott v. Cingular Wireless*[76]. In *Scott*, this Court found a provision in a contract violated Washington public policy when it insulated the author from intentionally breaching the contract.[77]

5. Developers were not entitled to attorney fees.

In their Opening Brief, Buyers showed how Developers had unilaterally terminated their purchase and sale agreement.[78] In fact, Developers admitted they breached the contract during depositions.[79] As a result, Buyers prevailed on liability and Developers had to return Buyers' deposits.[80]

Having prevailed on liability, Buyers were entitled to attorney fees because they were the only party who had received a "judgment" against the opposing party. The party is entitled to fees if they prevail on liability even if he or she

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[74] *Wagenblast v. Odessa Sch. Dist.*, 110 Wn.2d 845, 851-52, 758 P.2d 968 (1988).
[75] Petition for Review at 14-15.
[76] *See supra.*
[77] Petition for Review at 13-16.
[78] Opening Brief of Appellant at 35 citing FCP 60 and MCP 62.
[79] *Id.* at 35 *citing* FCP 161, Ln. 3-4; MCP 156-57.
[80] This is consistent with the plain meaning of the Limitation of Remedies Provision at issue here.

receives nominal damages;[81] and breaching party is not entitled to attorney fees against a non-breaching party.[82] Buyers had prevailed on their sole claim of Breach of Contract. *Miles v. F. E. R. M. Enterprises, Inc.*[83], *Dennis I. Spencer, Inc. v. City of Aurora*[84], *and Nouri v. Wester & Company,*[85]

The trial court ultimately agreed that no fees were awardable in this case, because Developers had not received a judgment against Buyers.[86]

The Court of Appeals disagreed and applied *Piepkorn v. Adams*[87] stating the "prevailing party" in a bilateral contract should be interpreted to mean the substantially prevailing party.[88] The Court then stated that Developers were the substantially prevailing party, because they had prevailed on Summary Judgment.[89]

Division One, however, improperly expanded the basis for an attorney award in this case by allocating attorney fees to the breaching party instead of the non-breaching party in a breach of contract case.[90] Buyers ask this Court to reverse Division One's award of attorney fees to Developers on one or more of the

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[81] *See Miles* at 73 (jury verdict with finding of $0 in damages for plaintiffs who brought race discrimination action against vendor of mobile home lot was not defense verdict, and hence plaintiffs were entitled to their costs).
[82] *See Miles v. F. E. R. M. Enterprises, Inc.*[82], *Dennis I. Spencer, Inc. v. City of Aurora*[82], *and Nouri v. Wester & Company,*[82] .
[83] 29 Wn. App. 61, 627 P.2d 564 (1981).
[84] 884 P.2d 326, 331 (1994).
[85] 833 P.2d 848 (1992).
[86] MCP 244; FCP 384-85.
[87] *Id.* at 5 *citing Piepkorn v. Adams*, 102 Wn. App. 673, 686, 10 P.3d 428 (2000) (*citing Marassi v. Lau,* 71 Wn. App. 912, 916, 859 P.2d 605 (1993)).
[88] *Id.* at 686.
[89] *Miller v. One Lincoln Tower* at 5.
[90] Opening Brief of Appellant at 34-41; Reply Brief of Appellant at 26-28.

following bases:

(1) Developers are not entitled to attorney fees because the plain meaning of the contract permitted attorney fees only when the trial court issued a judgment against the opposing party and no judgment was issued against Buyers;[91] In fact, the Judgment required Developers to return Buyer's deposits.

(2) Developers are not entitled to attorney fees in this case because the bilateral attorney fee provision is actually a unilateral attorney fee provision. Here, the trial court enforced the Provision Limiting Remedies and gave Buyers the maximum they could have received under the Provision Limiting Remedies – a return of their deposit.[92] Then, after Buyers received a judgment for the maximum they could receive, the appellate court awarded the Developers their attorney fees. If Buyers received the maximum they were entitled to, then how could they ever receive attorney fees?

(3) Because Developer is the breaching party, Developers may not receive and award of attorney fees against Buyers, the non-breaching party;[93] and

(4) Division One's allocation of attorney fees under *Piepkorn* was improper because this is an instance where both parties prevailed on major issues. Buyers prevailed on its breach of contract claim, and Developers prevailed on its Motion for Summary Judgment. When this occurs, Courts have not allocated attorney

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[91] Opening Brief of Appellant at 34-36
[92] TCP 326-28; MCP 244.
[93] Opening Brief of Appellant at 36-39.

fees to either party.[94]

This Court should reverse the Court of Appeals and award attorney fees to Buyers for their efforts at the Court of Appeals and remand this case to the trial court to award Buyers' their attorney fees at the trial court level.

6. Appellants are entitled to attorney fees on appeal.

RAP 18.1(a) allows parties to request attorney fees on appeal. The Contracts at issue here provide attorney fees to the prevailing party who receives a judgment in their favor. This is consistent with RCW 4.84.030. "A party is entitled to attorney fees on appeal if a contract...permits recovery of attorney fees at trial and the party is the substantially prevailing party."[95] Here, Appellants, as prevailing parties on appeal, are entitled to attorney fees in this matter. This Court should also award Buyers' their attorney fees for their efforts before this Court.

RESPECTFULLY SUBMITTED July 21, 2008.

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[94] *See, e.g., Puget Sound Service Corp. v. Bush*, 45 Wn. App. 312, 724 P.2d 1127 (1986) (When one party prevailed on the burden of proof issue and the other on issue of election of remedies, then on party had prevailed and neither party was entitled to fees).
[95] *Hwang v. McMahill*, 103 Wn. App. 945, 954, 15 P.3d 172 (2000), *review denied*, 144 Wn.2d 1011 (2001).